Supreme Court, U.S.
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CASE NO. 94-

in the Supreme Court of the United States

OCTOBER TERM, 1994

JON B. LINDEMAN,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Are the property rights of civil service, public employees in their jobs protected by the substantive component of the Due Process Clause of the Fourteenth Amendment?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jon B. Lindeman, petitions the Court to issue a writ of certiorari to the U. S. Court of Appeals for the Eleventh Circuit in the case of *Lindeman v. City of Miami*, No. 93-5336 (April 10, 1995), and shows the following.

OPINIONS BELOW

There are no official or unofficial reports of the opinions delivered in this case by other courts. Copies of the opinions of the U. S. District Court for the Southern District of Florida and the U. S. Court of Appeals for the Eleventh Circuit are reproduced in the appendix to this petition.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The date of entry of the judgment of the U. S. Court of Appeals for the Eleventh Circuit sought to be reviewed is April 10, 1995. There is no order respecting a rehearing. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

U. S. Const. amend. XIV, § 1, says at its pertinent part "nor shall any State deprive any person of life, liberty, or property, without due process of law." The provisions of Miami City Code Sections 40-36, 40-67 and 40-97 and Miami Civil Service Rules 8.1, 8.11, 12.1 and 12.2 are lengthy and each is set forth in the appendix to this petition.

STATEMENT OF THE CASE

This case is about the termination of a public employee with a property interest in his job for reasons that were arbitrary, capricious and without a rational basis (R1-80-14). Jon B. Lindeman was hired as an employee of the City of Miami in the State of Florida on December 17, 1973 (R1-

80-1). Lindeman was promoted to the position of chief management analyst on May 24, 1978 (R1-80-2) and became a permanent civil service employee in that position on November 24, 1978 (R1-80-2). The U. S. District Court for the Southern District of Florida found that Miami City Code Sections 40-36, 40-67 and 40-97 and Miami Civil Service Rule 8-11 created for Lindeman a property right in his employment with the City of Miami (R1-80-14).

On April 4, 1988, the City of Miami downgraded Lindeman's position to the job of principal productivity analyst (R1-80-2 to 3). At the same time, the city retitled the position of another employee in Lindeman's department, Sylvia Zamora, from principal management analyst to principal productivity analyst (R1-80-2). Zamora was a probationary employee in the positions of principal management analyst and principal productivity analyst (R1-80-2, 4). The district court found that Lindeman was "highly qualified" for the position of principal productivity analyst (R1-80-5). On May 9, 1988, Lindeman was told he was laid off from his job effective May 23, 1988 (R1-80-3 to 4). On May 24, 1988 Zamora was awarded a job in the position of principal productivity analyst (R1-80-4). The district court found that the position from which Lindeman was laid off and the position filled by Zamora "were one and the same position." (R1-80-6).

Miami City Code Section 40-67(1) says at its pertinent part:

> If the incumbent has been performing satisfactorily [in the position reclassified] at the new or higher level for a period of four (4) years or more and has held permanent status in the previous classification, he/she shall receive the new or higher classification with permanent status, without further examination.

(R1-80-5). The district court found that Lindeman had performed satisfactorily in the position of chief management analyst for a period of four years or more prior to his termination on May 24, 1988 (R1-80-5).

Miami Civil Service Rule 8.1 requires that every vacancy in the classified service be filled by appointment from an appropriate eligible register (R1-80-4). The district court found that the city violated this rule and failed to establish an eligible register prior to filling the principal productivity analyst position (R1-80-4). Miami Civil Service Rule 12.1 requires that probationary employees be laid off before permanent employees (App. 31). Miami Civil Service Rule 12.2 requires that when permanent employees are laid off, their names shall be placed on a layoff register (R1-80-5). The district court found that Lindeman was not placed on a layoff register when he was laid off (R1-80-5).

On January 19, 1991, the Miami Civil Service Board held that Miami's termination of Lindeman and hiring of Zamora as principal productivity analyst violated Civil Service Rules 8.11 and 12.1 primarily because "Zamora was not only junior to Mr. Lindeman, but was a probationary employee as of the layoff of Jon B. Lindeman." (R1-80-5). The Civil Service Board recommended that Lindeman be awarded back pay, adjustments to his salary and pension and otherwise be made whole (R1-80-5 to 6). The Miami City Manager, on April 12, 1991, rejected the findings and recommendations of the Civil Service Board (R1-80-6). On March 9, 1992, the Appellate Division of the Florida Eleventh Judicial Circuit overturned the City Manager's action and required him to follow the decision of the Civil Service Board, finding that the reasons given by the City Manager for not following the recommendations of the Civil Service Board were "spurious, at best." (R1-80-6) The Florida Circuit Court

refused to retain jurisdiction over the issue of the amount of back pay due Lindeman (App. 22).

Lindeman sued the City of Miami in the U. S. District Court for the Southern District of Florida on July 2, 1991 seeking damages and equitable relief to make him whole (R1-1). Jurisdiction was based upon 28 U. S. C. §§ 1331 and 1343 as the action arose under the constitution and laws of the United States and was brought to redress the deprivation, under color of state law, of a right secured by the constitution of the United States. (R1-1-1) The complaint alleged a denial of due process of law in the termination of employment with the city and sought recovery pursuant to 42 U. S. C. § 1983 (R1-1-6). Trial was held beginning January 20, 1993 (R1-80-1). At trial, the senior personnel officer in the city's Office of Personnel Management testified that the city violated its own civil service rules in the discharge of Lindeman and hiring of Zamora (R1-80-6). The city's labor relations officer testified that shortly before the trial Lindeman was paid the back pay due him, but not his accrued vacation pay or sick pay (R3-271).

The district court found the testimony of the city's department director and the City Manager regarding the reasons for Lindeman's termination to be "disingenuous and not credible." (R1-80-7). The district court further found that the director of Lindeman's department demonstrated a personal animosity toward Lindeman due to Lindeman's participation in the U. S. Naval Reserve and Lindeman's military obligations which the department head felt infringed on Lindeman's obligations to the City of Miami (R1-80-7 to 8).

Judgment was entered by the district court in favor of Lindeman and against the City of Miami (R1-79-1). Compensatory damages were awarded for humiliation,

embarrassment, degradation, mental anguish and suffering in the amount of $25,000 (R1-79-1). Damages for lost vacation pay and lost sick pay were awarded in the amount of $7,370 (R1-79-1). The U. S. Court of Appeals for the Eleventh Circuit granted a summary reversal, without the filing of briefs, based upon the precedent of *McKinney v. Pate*, 20 F. 3d 1550 (11th Cir.) (en banc), *cert. denied*, 115 S. Ct. 898 (1995) (App. 16). In *McKinney*, 20 F. 3d at 1556, the court held that public employees' property rights in their jobs "are not subject to substantive due process protection under the Due Process Clause."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Decision in Conflict with a Decision of Another United States Court of Appeals on the Same Matter

Decisions directly opposite the decision in the present case, and opposite *McKinney v. Pate*, *supra*, were rendered by United States Courts of Appeals in *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1989), *cert. denied*, 493 U. S. 1078 (1990); *Gargiul v. Tompkins*, 704 F.2d 661 (2d Cir. 1983), *vacated on other grounds*, 465 U. S. 1016 (1984); *Moulton v. City of Beaumont*, 991 F.2d 227 (5th Cir. 1993); *Morris v. Clifford*, 903 F.2d 574, (8th Cir. 1990), and *Brenna v. Southern Colorado State College*, 589 F.2d 475 (10th Cir. 1978).

In *Newman v. Massachusetts*, 884 F.2d at 25, the court said "it was clearly established in our circuit that school authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment status are liable for a substantive due process violation." (footnote omitted). In *Gargiul v. Tompkins*, the court said:

> Gargiul's position as a tenured teacher was indisputably a property interest protected by the fourteenth amendment. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct., 2694, 33 L.Ed.2d 570 (1972). Gargiul was entitled, under New York law, to certain substantive and procedural safeguards against deprivation of that interest. *See* N.Y. Educ. Law §§ 3012, 3020, 3020-a (McKinney 1981). Accordingly, principles of substantive due process require that the Board's actions impairing that interest have a rational relation to a proper governmental purpose. *See Koch v. Yunich*, 533 F.2d 80, 84 (2d Cir.1976). If Gargiul's lengthy suspension without pay resulted from an arbitrary or capricious exercise of the Board's power, her due process rights were violated. *See Brenna v. Southern Colorado State College*, 589 F.2d 475 (10th Cir.1978); *Simard v. Board of Education*, 473 F.2d 988, 994 (2d Cir.1973).

704 F.2d at 668

The opinion in *Moulton v. City of Beaumont*, 991 F.2d at 230 (5th Cir. 1993), says: "To succeed with a claim based on substantive due process in the public employment context, the plaintiff must show two things: (1) that he had a property interest/right in his employment, and (2) that the public employer's termination of that interest was arbitrary or capricious." (footnote omitted). In *Morris v. Clifford*, both sides agreed and the Eighth Circuit concluded that the plaintiff, as a tenured faculty member at a public college, "has a substantive due process right to be free from discharge for reasons that are 'arbitrary and capricious,' or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact." 903 F.2d at 577.

The court said in *Brenna v. Southern Colorado State College*:

> In order to present a claim of denial of "substantive" due process by a discharge for arbitrary or capricious reasons, a liberty or property interest must be present to which the protection of due process can attach. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977); *Weathers v. West Yuma County School District* R-J-1, 530 F.2d 1335-38 (10th Cir. 1976). Professor Brenna was tenured and thus had a property interest deserving of the procedural and substantive protections of the Fourteenth Amendment.

589 F.2d at 476. Later, in *Archuleta v. Colorado Department of Institutions*, 936 F.2d 483, 489 n.6 (10th Cir. 1991), the Tenth Circuit said that it was assuming, without holding, that a civil service, public employee's property interest in her job is entitled to the protection of substantive due process.

The Third Circuit in *San Filipo v. Bongiovanni*, 961 F.2d 1125, 1139 (3d Cir. 1992), recognized, without deciding the issue, that a tenured, public university faculty member had a substantive due process right to be free from discharge for arbitrary and capricious reasons.

The Sixth Circuit is of two minds on this issue. In *Johnson-Taylor v. Gannon*, 907 F.2d 1577, 1582 (6th Cir. 1990), *cert. denied* 113 S.Ct. 1583 (1993), the court recognized a substantive due process right not to be discharged from public employment without a rational basis for the discharge. In *Feliciano v. City of Cleveland*, 988 F.2d 649, 657 (6th Cir.), *cert. denied*, 114 S.Ct. 90

(1993), the court held that public employees can succeed on a substantive due process claim if they show that the test for their discharge does not bear a reasonable relation to a legitimate government interest, that the testing procedures are so unreliable that they are irrational or lead to irrational results or that procedures used shock the conscience. In between, the Sixth Circuit decided *Sutton v. City of Cleveland*, 958 F.2d 1339 (6th Cir. 1992), *Thomson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2341 (1993) and *Holthaus v. Board of Education*, 986 F.2d 1044 (6th Cir. 1993). In *Sutton*, 958 F.2d at 1351, the court said "that plaintiffs statutory right to be discharged only for cause is not a fundamental interest protected by substantive due process." The court reaffirmed the *Sutton* holding in *Thomson*, 977 F.2d at 1020, and *Holthaus*, 986 F.2d at 1046.

In *Samargia v. Clark County*, 859 F.2d 88, 90-91 (9th Cir. 1988), *modified on other grounds*, 866 F.2d 1185 (9th Cir. 1989), the Ninth Circuit recognized, without addressing the claim, that the layoff of a public employee based on a sham could be the basis of a claim under 42 U. S. C. § 1983 that the termination violated substantive due process rights protected by the Fourteenth Amendment.

Decision in Conflict with Applicable Decisions of this Court

In *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952), this Court said concerning protection provided by the Due Process Clause of the Fourteenth Amendment: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." This portion of the *Wieman* decision

was quoted with approval in *Slochower v. Board of Higher Education*, 350 U.S. 551, 556 (1956). In a decision holding the discharge of a public employee to be in violation of the substantive component of the due process clause, the same language was, again, quoted with approval in *Cramp v. Board of Public Instruction*, 368 U. S. 278, 288 (1961). The *Wieman* decision was explained in *Cafeteria and Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961), to mean "that the state and federal governments, even in the exercise of their internal operations, do not *constitutionally* have the complete freedom of action enjoyed by a private employer." (emphasis supplied).

In *Harrah Independent School District v. Martin*, 440 U. S. 194 (1979), the respondent before the Court was a tenured, Oklahoma public school teacher whose employment was terminated by the local school board. In its opinion, this Court said: "If respondent is to succeed in her claims under the Fourteenth Amendment, it must be on the basis of either 'substantive' due process or equal protection." *Harrah Independent School District*, 440 U. S. at 198. In discussing the substantive due process claim, the Court expressly pointed out "there is no claim that the interest entitled to protection as a matter of substantive due process was anything resembling 'the individual's freedom of choice with respect to certain basic matters of procreation, marriage and family life'." *Id.* at 198. The case involved a pure substantive due process claim.

The respondent employee's claim in *Harrah Independent School District* was that the public employer "acted arbitrarily in imposing a new penalty for non-compliance" with its rules. 440 U.S. at 198-99. This Court explained that "the burden is on respondent to show that there is no rational connection between the Board's action and the School District's conceded interest in providing its

students with competent, well-trained teachers." *Id.* at 198. The Court did not deny the claim on the basis that a public employee's property right in her job was not protected by the substantive competent of the due process clause of the Fourteenth Amendment. Rather, the Court said: "Such a course of conduct on the part of a school board responsible for the public education of students within its jurisdiction, and employing teachers to perform the principal portion of that task, can scarcely be described as arbitrary." 440 U. S. at 199.

Unless one is willing to argue that the U. S. Supreme Court was engaged in a meaningless analysis of the facts and law, the decision in *Harrah Independent School District v. Martin, supra,* accepts the traditional substantive due process analysis as applicable to the deprivation of the property right of a civil service employee in her job.

Important Question of Law Which Should be Settled by this Court

The *Statistical Abstract of the United States* at 421, U. S. Department of Commerce (1994), reports that in 1993 there were 18.842 million government employees in the United States. Though not each had a property interest in a job, the figure is indicative that millions of people have a direct concern with obtaining a definitive determination by this Court as to whether the property interests they hold in their civil service jobs are protected by substantive due process against arbitrary and capricious conduct by their government employers. Because of the large number of public employees in this country, this is an issue that will arise time and again, will present the lower courts with a question of law on which there are conflicting precedents, and will not go away without a definitive ruling by this Court.

In *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989), *cert. denied*, 493 U. S. 1057 (1990), the Ninth Circuit wrote that the U.S. Supreme Court "is still uncertain as to the nature of substantive due process protection" in the area of public employment. The First Circuit said in *Newman v. Burgin*, 930 F.2d 955, 962 (1st Cir. 1991):

> The Supreme Court has twice said that it would *assume* that an individual, in respect to "property," has a Constitutional ("due process") right to be "free from arbitrary state action." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223, 106 S.Ct. 507, 512, 106 S.Ct. 507 (1985); *see Board of Curators v. Horowitz*, 435 U.S. 78, 91-92, 98 S.Ct. 948, 955-956, 55 L.Ed.2d 124 (1978). But it has not explicitly *held* that such a right exists, nor has it described its contours.

In *Archuleta v. Colorado Department of Institutions*, 936 F.2d at 489 n. 6, the Tenth Circuit said it was assuming that public employment rights were entitled to substantive due process protection, without so holding, because "[i]t appears that the Supreme Court has not expressly determined whether all property is entitled to such protection." The Seventh Circuit in *Zorzi v. County of Putnam*, 30 F.3d 885, 894 (7th Cir. 1994), recognized the concept that a discharged public employee who has a property interest in her job could bring a claim based on substantive due process of law, but did so in a manner which did not directly address the issue decided by the Eleventh Circuit in the present case.

The framers of the constitution intended that its principles would apply equally throughout the nation. James Madison in presenting to the first Congress a Bill of Rights, which included the Due Process Clause of the Fifth Amendment, assigned as one of the principal purposes of

his amendments obtaining an equality of those rights for persons in all of the states. 1 *Annals of Cong.* 439 (Joseph Gales ed., 1789). The proponents of the Fourteenth Amendment recognized that its Due Process Clause was taken from the Fifth Amendment and presented as one of its purposes that "all shall be protected alike in life, liberty and property." Remarks of Senator Jacob Howard, *Cong. Globe*, 39th Cong., 1st Sess. 1089 (1866).

Under the present conflict among the circuit courts, the constitutional rights of civil service, public employees are not being protected alike for all persons in the several states. Rather those rights depend upon the geographic location of employment and the particular federal judicial circuit setting the controlling precedent for the state in which the public employee works. Unequal application of the constitution can only engender disrespect for the rule of law and the judicial process.

A primary function of the Supreme Court, as envisioned by the founders of the republic, was as a superintending power to secure uniformity in the exposition of the constitution, laws and treaties of the United States. Remarks of James Madison as reprinted in 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (1836), (hereafter, Elliot, *Debates*) and remarks of Edmund Pendleton, president of the Convention of the Commonwealth of Virginia, on the adoption of the federal constitution, reprinted at 3 Elliot, *Debates* 518-19. James Iredell, speaking at the North Carolina convention, observed:

> The propriety of having a Supreme Court in every government must be obvious to every man of reflection. There can be no other way of securing the administration of justice uniformly in the

> several states. There might be, otherwise, as many different adjudications on the same subject as there are states.

4 Elliot, *Debates* 147.

CONCLUSION

In order to obtain uniformity in the construction of the constitution and to obtain equality for persons in the several states in the rights and protections secured by the constitution, petitioner prays this court issue its writ of certiorari and accept jurisdiction over this cause.

Respectfully submitted,

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Appendices

APPENDIX A

[FILED JULY 14 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-1404-CIV-HIGHSMITH

JON B. LINDEMAN,

Plaintiff,

vs.

CITY OF MIAMI,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS CAUSE is before the Court upon the conclusion of a two-day non-jury trial that commenced on January 20, 1993. The Court heard the testimony of numerous witnesses and examined a number of documents and personnel records. The Court has considered all of the evidence and now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

(1). Plaintiff Jon B. Lindeman is an individual residing in Dade County, Florida.

(2). Defendant City of Miami ("Miami") is a municipality located in Dade County, Florida.

(3). At all times relevant to this cause of action, Miami's employees acted within the course and scope of their employment with Miami.

(4). Lindeman was hired by Miami on or about December 17, 1973.

(5). On May 24, 1978, Lindeman was promoted to the position of chief management analyst.

(6). The classification of chief management analyst was within the classified service of Miami employees, pursuant to Section 1.3 of the City of Miami Civil Service Rules and Regulations ("Civil Service Rules").

(7). On November 24, 1978, Lindeman became a permanent civil service employee of Miami in the classification of chief management analyst, pursuant to Section 1.7 of the Civil Service Rules.

(8). On or about April 4, 1988, Miami City Manager Cesar Odio approved a separation of functions plan applicable to Miami's Department of Management and Budget.

(9). Pursuant to this plan, the Department of Management and Budget's Division of Operations Analysis became the Office of Industrial Engineering. Frank May, the acting director of the Department of Management and Budget, was named the acting director of the Office of Industrial Engineering.

(10). On or about April 4, 1988, Miami issued a Department of Personnel Management Classification and Pay Report entitled, "Audit of the Proposed Productivity Analyst Series in the Industrial Engineering Office." ("Study 88-46").

(11). Study 88-46 contains two primary changes in job classification titles, providing in pertinent part that:

a. The position of principal management analyst, held by Sylvia Zamora, shall be "retitled" principal productivity analyst. "Sylvia Zamora, probationary, may remain in the position."

b. The position of chief management analyst, held by Lindeman, shall be "downgraded" to principal productivity analyst. "Jon Lindeman, permanent, may remain in the position in accordance with Civil Service Rule 8.11(a), and be red-circled in accordance with APM-5-78, Section 16. This action will not change the pay rate, status or anniversary date of the incumbent."

(12). At no time prior to his termination was Lindeman ever advised by any supervisor of the existence of Study 88-46. In fact, the decision to implement Study 88-46 was made in April, 1988, but Lindeman was not notified of any impending changes until he received his two-week lay-off notice on May 9, 1988.

(13). The position of principal productivity analyst was within the classified service of Miami employees, pursuant to Section 1.3 of the Civil Service Rules.

(14). In April, 1988, Miami's executive assistant to the City Manager approved a request to reclassify the personnel of the Operations Analysis Division to reflect the responsibilities of the Office of Industrial Engineering.

(15). On or about April 18, 1988, Frank May, the acting director of Office of Industrial Engineering signed a "request for personnel action form" changing Lindeman's job title from chief management analyst to principal productivity analyst, pursuant to Study 88-46.

(16). on or about April 19, 1988, May submitted a "position authorization form" to implement changes in occupation codes and titles, pursuant to Study Number 88-46.

(17). On May 9, 1988, Lindeman was told that he was "laid off" from employment with Miami, effective May 23, 1988.

(18). Shortly thereafter, on May 24, 1988, pursuant to the recommendation of Frank May and Study 88-46, the "newly created" position of principal productivity analyst in the Office of Industrial Engineering was filled by a probationary employee named Sylvia Zamora.

(19). Prior to her promotion to principal productivity analyst, Zamora was in probationary status in the position of principal management analyst. Beginning in 1981, Zamora, like Lindeman, worked under May's supervision, both in the Management and Budget Department and in the Office of Industrial Engineering.

(20). May's "request for personnel action," approved June 6, 1988, through which Zamora was promoted, states, in pertinent part: "Position filled in accordance with Civil Service Rule 8.1."

(21). Civil Service Rule 8.1 requires that every vacancy in the classified section must be filled by appointment from an appropriate eligible register.

(22). The Court finds that Miami failed to establish an eligible register, in violation of Rule 8.1, for the newly created position of principal productivity analyst prior to the hiring of Zamora. Instead, Miami erroneously filled the position by using the eligible register for the position of principal management analyst.

(23). When an occupied position, such as chief management analyst, is allocated to a new or different class, such as principal productivity analyst, the incumbent shall be qualified for the new class:

> If the incumbent has been performing satisfactorily (in the position reclassified) at the new or higher level for a period of four (4) years or more and has held permanent status in the previous classification, he/she shall receive the new or higher classification with permanent status, without further examination.

Miami Code Section 40-67.

(24). Lindeman's employment position of chief management analyst was rated at a higher level than the newly-created position of principal productivity analyst.

(25). Lindeman performed satisfactorily in the position of chief management analyst for a period of four years or more prior to his termination on May 24, 1988. Therefore, this Court finds that Lindeman was highly qualified for the position of principal productivity analyst.

(26). Civil Service Rule 12.2 requires that employees who have held permanent status in the classified service and are laid off shall be placed on a layoff register. Lindeman's name was not placed on the layoff register in a timely manner.

(27). On or about January 19, 1991, Miami's Civil Service Board held that Miami's termination of Lindeman and designation of Zamora as principal productivity analyst violated Civil Service Rule 8.11(a) and Rule 12.1, primarily because, "Zamora was not only junior to Mr. Lindeman, but was a probationary employee as of the

layoff of Jon B. Lindeman." The Board recommended that Lindeman "receive back pay, that the appropriate adjustments be made to his past and present salary [and] pension plan, that appropriate adjustments be made to his title, and that [he] otherwise be made whole as the result of the wrongful layoff."

(28). On or about April 12, 1991, Miami City Manager Cesar Odio rejected the findings and recommendations of Miami's Civil Service Board.

(29). On March 9, 1992, a Florida circuit court overturned Odio's actions and required Odio to follow the recommendations of the Civil Service Board. *Lindeman v. City of Miami*, Case No. 91-124AP (Fla. Cir. Ct., App. Div., 1992). The court noted that "the reasons given by the [City] Manager for not accepting the findings and recommendation of the Board are spurious, at best . . . The new position was, in fact, a simple reclassification." In conclusion, the Court noted that "a city cannot act in an arbitrary and capricious manner."

(30). This Court finds, without doubt, that the position of principal productivity analyst, filled by Sylvia Zamora, and the position of chief management analyst, from which Jon Lindeman was terminated, were one and the same position.

(31). In addition, the Court agrees with the Civil Service Board's conclusion that Lindeman was terminated and Zamora was hired in violation of Civil Service Rules 12.1 and 8.11(a), because Zamora was a probationary employee and was junior to Lindeman. The Court also finds credible the testimony of Joni Jones-Harris, the senior personnel officer of the Office of Personnel Management. Jones-Harris testified that Miami broke Civil Service Rules during the firing of Lindeman and the hiring of Zamora.

(32). The Court finds that Lindeman had a property right in his employment with Miami, pursuant to Miami's City Code and Civil Service Rules. *See* Civil Service Rule 8-11 and Miami City Code §§ 36, 40-67, 40-97.

(33). The Court finds that the testimony of Frank May and Cesar Odio regarding the termination of Lindeman and the promotion of Zamora is disingenuous and not credible. These two witnesses repeatedly evaded direct questions and avoided explaining their actions. For instance, the Court finds that May considered only one person, Sylvia Zamora, for the newly created position of principal productivity analyst, and the Court finds that May reached this decision well before Lindeman was terminated. Yet, May could offer no explanation for his failure to inform Lindeman of Study 88-46, his impending termination, or the impending promotion of Zamora. In fact, May failed to explain why an eligibility list was not created, or why he failed to inform Lindeman of any deficiencies in his work or conduct.

(34). May testified that his primary reason for promoting Sylvia Zamora was her exceptional aptitude in computer analysis. This Court finds, however, that May's explanation was pretextual, because May's primary goal was to promote Zamora, a probationary employee, for personal reasons, at the expense of Lindeman, a permanent employee.

(35). In addition, the Court finds that May demonstrated a personal animosity towards Lindeman, because Lindeman's naval reserve responsibilities sometimes required him to leave the workplace. In May's personal opinion, Lindeman's military obligations "consumed taxpayer's time and money." May was also annoyed by the number of telephone calls that Lindeman received while at work from naval reserve offices. At no

time, however, was Lindeman ever disciplined for any misconduct on the job.

(35). Cesar Odio, the City Manager of Miami, credibly testified that Frank May had the final authority to hire, fire, and lay off employees in his department. In other words, it is a common policy of Miami to defer all hiring and firing decisions in the Office of Industrial Engineering to May. In practice, these employment decisions are not subject to review by the City Manager or the City Commission, although Odio did testify that employment decisions are not allowed to violate the Civil Service Rules.

(36). It is apparent to the Court, however, that in cases where an employment decision violates Civil Service Rules, the City Manager and the City Commission do not, as a matter of custom or policy, act to correct incorrect employment decisions. For instance, Odio testified that he did not review the termination of Lindeman, but merely assumed that it followed the Civil Service Rules. In addition, Gerald Silverman, chairman of Miami's Civil Service Board, credibly testified that during his seventeen years of employment with Miami, he did not know of a single instance when the City Commission overruled an employment decision made by the City Manager or another city employee. Most importantly, both Odio and May testified that the procedures used in Lindeman's termination were the normal and accepted procedures followed by Miami in all similar employment termination situations. This Court finds that in the Office of Industrial Engineering, the final employment decision resided with Frank May.

(37). The testimony of Jon Lindeman, Ellen Lindeman, and Jon Lindeman's close friend, Carlos Aldunate, is highly credible. Lindeman's termination was "gut-wrenching" and deeply embarrassing, not only for

Lindeman, but for Ellen Lindeman, his wife of 31 years, and his two sons. During his five-month lay-off, Lindeman searched earnestly for another position and suffered symptoms of depression, frustration and anger that commonly accompany an unjustified termination. Eventually, in October, 1988, Lindeman was hired as principal staff analyst for the Parks Department of Miami.

(38). As a direct result of the improper actions of Miami, Jon Lindeman suffered compensatory damages for humiliation, embarrassment, degradation, mental anguish and suffering in the total amount of $25.000.00.

(39). Manny Figueroa, a certified public accountant, credibly testified that the monetary value of Lindeman's lost vacation pay and sick pay is $7,370.50. (Plaintiff's Exhibit # 39).

CONCLUSIONS OF LAW

The Eleventh Circuit's substantive due process standard of review in wrongful termination cases, although controversial, is quite clear.[1] To prove a substantive due process violation, a court must decide:

> Whether the decision . . . deprived [the plaintiff] of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and, because unrelated to the proper reasons for layoff, without any rational basis.

Adams v. Sewell, 946 F.2d 757, 764 (11th Cir. 1991) (citing to *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1983)).

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[1]Substantive due process prohibits the government from engaging in certain activity regardless of the procedures used to implement that activity. *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990).

In other words, to prevail on a 42 U.S.C. § 1983 substantive due process claim, a plaintiff must demonstrate: (1) a protected property interest in the job; (2) an improper deprivation of that property interest that was pretextual, arbitrary and capricious and without any rational basis; and (3) that this deprivation was committed pursuant to the municipality's custom or policy. This Court adopted that standard in the Court's Order Dated May 20, 1992, denying Miami's motion for summary judgment. (D.E. # 42 at 7). Several months later, this Court reaffirmed that the proper standard for a substantive due process employment termination challenge is the standard set out in *Adams v. Sewell*. (Order Denying Motion for Reconsideration, D.E. # 55).

The Eleventh Circuit recently revisited the substantive due process standard of review as applied in a municipal employment termination case. *McKinney v. Pate*, 985 F.2d 1502 (11th Cir. 1993). In *McKinney*, a building inspector alleged that the reasons for his termination from his municipal job were pretextual. The county argued that he was fired because of a business conflict of interest, but the plaintiff contended that he was fired out of personal animosity, primarily because he was actually attempting to enforce the local building code. As in Lindeman's case, McKinney asserted that, pursuant to municipal policy, he could only be discharged for cause, and that instead his discharge was founded on illegitimate motives. Therefore, he claimed that the termination deprived him of a protected property interest in his job without substantive due process. A jury verdict was entered in favor of McKinney, but the district court granted the municipality's motion for judgment notwithstanding the verdict.

On appeal, the Eleventh Circuit vacated the district court's order setting aside the jury verdict. The analysis

portion of this decision, however, was split into two diametrically opposed parts. In Part I, Judge Peter T. Fay held that, "It is well settled that such claims state a substantive due process violation—deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and without any rational basis." *McKinney*, 985 F.2d at 1505 (citing *Hearn*, 688 F.2d at 1332; *Adams*, 946 F.2d at 766). Therefore, Judge Fay proceeded to apply the Eleventh Circuit's long-standing substantive due process standard of review for employment termination cases.

In Part II, Chief Judge Gerald Bard Tjoflat and Judge Emmett Ripley Cox specially concurred with Judge Fay in the judgment of the court.[2] Judge Tjoflat, however, concluded that the Eleventh Circuit's substantive due process standard of review is "out of touch" with the United States Supreme Court's substantive due process jurisprudence. Essentially, Judge Tjoflat contends that:

> While the Supreme Court has used substantive due process as a means of recognizing fundamental rights implicit in the concept of ordered liberty, the Eleventh Circuit has strayed from this narrow path and created for state or local employees a "substantive" right not to be terminated for pretextual reasons even where state procedures exist which would correct the injustice and make them whole.

McKinney, 985 F.2d at 1507-08 (Tjoflat, J., specially concurring).

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[2]Judge Tjoflat stated that, "Because we are bound by circuit precedent, I concur in the judgment of the Court." *McKinney*, 985 F.2d at 1507. As Judge Tjoflat noted, "Per *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), a prior panel's holdings can only be overruled by the court sitting en banc.

Initially, Judge Tjoflat summarizes the evolution of the substantive due process cause of action in the Eleventh Circuit, starting in 1983 with *Hearn* and concluding in 1991 with *Adams*. To state a claim for substantive due process in the Eleventh Circuit, Judge Tjoflat concludes that a plaintiff must demonstrate: (1) a deprivation of a state law property right in continued employment; (2) made through pretextual means to disguise an improper motive. *Id.* at 1509.

Judge Tjoflat argues that, "Satisfaction of these requirements will not make out a substantive due process claim under the jurisprudence of the Supreme Court. Only *procedural* issues are implicated." *Id.* This is because the Supreme Court only allows substantive due process claims to "prevent the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Id.* at 1510 (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)) and *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). In effect, the Supreme Court will only invoke substantive due process to protect a "fundamental interest" or otherwise preclude the abusive exercise of government power. *Id.*

In Judge Tjoflat's opinion, only procedural due process rights, not substantive due process rights, are implicated when dealing with the protection of state-created contract rights, particularly employment rights. *Id.* at 1511. Employment rights are simply "less elemental" because such rights are not "fundamental to our democratic society." *Id.* Accordingly, Judge Tjoflat would conclude that a plaintiff cannot state a substantive due process cause of action for wrongful employment termination based on pretextual discharge unless the discharge implicates fundamental constitutional rights. *Id.* at 1515.

Fortunately, this Court need not decide whether to follow the reasoning of Judge Fay or Judge Tjoflat, because *Adams* is binding precedent until overturned by an en banc panel of the Eleventh Circuit. See *Bonner*, 661 F.2d at 1209. This Court has already found that Lindeman had a protected property interest in his job. *See Hearn*, 688 F.2d at 1331 ("Where a statute or ordinance lists specific reasons for discharge of a public employee or states that a public employee can only be terminated for just cause, Florida courts hold that the employee has a property right of which he cannot be deprived without due process."). Lindeman's position was a classified position according to Section 1.3 of the Civil Service Rules. When such a position is allocated to a new class, Miami Code Section 40-67 provides that any person in Lindeman's position is entitled to a new position if the incumbent has been performing satisfactorily for the previous four years. It is undisputed that Lindeman's job performance was satisfactory during his entire professional career. Consequently, the Court concludes that Lindeman had a property interest in his job. *See also* Civil Service Rule 14.1 (Guaranteeing that no employee in the classified service shall be terminated or laid off without just cause.).

In addition, this Court concludes that Lindeman was terminated from his job for an improper motive that was pretextual, arbitrary and capricious, and without rational basis. *Adams*, 946 F.2d at 766. The underlying procedures used to terminate Lindeman violated various Civil Service Rules. Miami failed to introduce a credible explanation for these violations. In fact, the only reason that Miami presented for Lindeman's termination, a lack of computer skills, was pretextual, because Lindeman was terminated as a result of personal disagreements between Lindeman and his supervisor, Frank May. In addition, a Florida circuit court has already found, as did this Court, that Miami acted in an arbitrary and capricious manner in

discharging Lindeman because Miami failed to follow its own rules and regulations. There was simply no rational reason for terminating Lindeman.

Finally, this Court concludes that Lindeman's improper termination was conducted pursuant to a custom or policy of the City of Miami. To state a cause of action, pursuant to 42 U.S.C. § 1983, Lindeman must not only establish a constitutional deprivation, but he must also demonstrate that the deprivation was caused by a municipal policy or custom. *Samples v. City of Atlanta*, 846 F.2d 1328, 1333 (11th Cir. 1988). "The mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policymaking authority. Rather, the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies and are not subject to review." *Wright v. Shepard*, 919 F.2d 665, 674 (11th Cir. 1990) (quoting *Mandel v. Doe*, 888 F.2d 783, 792 (11th Cir. 1989)).

This Court has previously found that the custom and policy of Miami, over a number of years, was to allow the final decision for employee terminations to rest with the individual department directors. In this case, Frank May made the final decision to terminate Lindeman, and Cesar Odio approved that decision without any further consideration or review. Odio's rubber-stamping of May's termination decision is chargeable to Miami. *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 998 (11th Cir. 1989).

In fact, this Court has found that even in situations where department directors do not follow the Civil Service Rules, final authority to make employment decisions still rests with the department directors. There is no meaningful review of employment decisions by the City Manager or by the City Commission, even though, in a

technical sense, provisions providing for such review do exist in the Civil Service Rules. The Court concludes that May's employment decisions were not constrained by official policies and were not subject to meaningful review.

CONCLUSION

This Court concludes that Lindeman has demonstrated the existence of a protected property interest. In addition, Lindeman has demonstrated the deprivation of a protected property interest for pretextual and arbitrary and capricious motives. Finally, Lindeman has demonstrated that the deprivation occurred pursuant to a custom and/or policy of the City of Miami. For these reasons, it is hereby

ORDERED AND ADJUDGED that judgment shall be entered in favor of Plaintiff Jon B. Lindeman and against Defendant City of Miami by separate order of this Court, pursuant to *Fed.R.Civ.P.* 58.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 14th day of July, 1993.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Albertine B. Smith, Esq.
Joel V. Lumer, Esq.
John J. Spiegel, Esq.

APPENDIX B

[FILED APR 10 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5366

JON B. LINDEMAN,

Plaintiff-Appellee-Cross-Appellant,

versus

CITY OF MIAMI,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: COX, DUBINA and BARKETT, Circuit Judges.

BY THE COURT:

Appellant's motion for summary reversal is GRANTED. This matter is REMANDED to the district court for the entry of a judgment consistent with *McKinney v. Pate*, 20 F.3d 1550 (11th Cir.) *cert. den.* ____ U.S. ____, 115 S.Ct. 898, 899, ____ L.Ed.2d ____ (1995).

APPENDIX C

[FILED MAR 9 1992]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

APPELLATE DIVISION

CASE NO. 91-124AP

JON B. LINDEMAN,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

Opinion filed MARCH 09, 1992.

A Petition for Writ of Certiorari from the CITY OF MIAMI PERSONNEL, Dade County, Florida.

JOEL V. LUME, JOHN J. SPIEGEL for petitioner.

JORGE L. FERNANDEZ, KATHRYN S. PECKO, ASSISTANT CITY ATTORNEY for respondent.

Before SIDNEY SHAPIRO, R0SEMARY JONES and MARTIN KAHN, JJ.

S.B. SHAPIRO, J.

Petitioner sought review of certain action taken by the City Manager of the City of Miami who refused to uphold the decision of the City's Civil Service Board.

After hearing, the Civil Service Board made several findings, one of which concluded that the appointment ultimately made to the available position violated Civil Service Rule 8.1(a) dealing with qualifying incumbents to new positions. The Board also found that Rule 12.1 was violated in that the appointee, Zamora, was not only junior to petitioner, but was also a probationary employee in the position she held. Based on the numerous findings, the Board recommended that petitioner receive back pay, and that appropriate adjustments be made to his salary and fringe benefits. These recommendations should have been accepted by the City Manager.

The reasons given by the Manager for not accepting the findings and recommendation of the board are spurious, at best. The Manager is required to give great weight to these findings and recommendations unless the are against the clear preponderance of the evidence. *City of Miami v. Huttoe*, 38 So.2d 819 (Fla. 1949). In the case sub judice, he gave them no weight, but instead, totally ignored them. The new position was, in fact, a simple reclassification.

In civil service matters, a city cannot act in an arbitrary and capricious manner. An individual, once hired by the governmental authority, has an employment status entitling him to protection against unjust and unlawful job deprivation. *Farmer v. City of Fort Lauderdale*, 427 So.2d 187, 191 (Fla. 1983).

This Court in its appellate capacity, has the authority to require the municipal authority to follow appropriate procedures. *City of Miami v. Meynarez*, 546 So.2d 771 (Fla.

3d DCA 1989). We grant the petition of Jon B. Lindeman for a writ of certiorari overturning the City Manager's actions and requiring him to follow the recommendations of the Civil Service Board.

GRANTED.

JONES, J. concurs.

KAHN, J. specially concurs with written opinion.

KAHN, J. specially concurring.

Mr. Lindeman was discharged from his employment with the City when his position was abolished. Another open position was filled by someone else, and Mr. Lindeman suggested that the City wrongfully deprived him of that job. The Civil Service Board of the City agreed with Mr. Lindeman, but the city manager ruled otherwise, bringing about the petition before this court.

Both parties acknowledge that controlling is *City of Miami v. Walsh*, 139 So. 2d 164 (Fla. 3d DCA 1965) which held that the city manager may not act contrary to the findings of the Civil Service Board if there is substantial, competent evidence to support those findings.

The City argues that the manager's action was justified because there was no substantial, competent evidence to support the action of the Civil Service Board. A careful review of the record refutes the manager's conclusion, so the action of the Civil Service Board must be adopted.

APPENDIX D

[FILED MAR 18 1992]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Appellate Division

Case No. 91-124-AP

JON B. LINDEMAN,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

MOTION TO RESERVE JURISDICTION
ON ISSUE OF BACK PAY
Fla. Bar Nos. 193300 and 501832

Petitioner, Jon B. Lindeman, moves the court to reserve jurisdiction over the issue of the amount of back pay due the petitioner in the above referenced case. In support of his motion the petitioner shows:

1. On March 9, 1992 the court ordered that respondent follow the recommendations of the Miami Civil Service Board that petitioner receive back pay and that appropriate adjustments be made to his salary and fringe benefits.

2. Petitioner will make a good faith effort to resolve with respondent the amount of back pay, salary and fringe benefit adjustments due and will do so promptly.

3. In the event that the parties are not able to agree on the amount of back pay, salary and fringe benefit adjustments due within a reasonable period of time, petitioner requests that the court retain jurisdiction over this case.

4. Past experience has indicated that the respondent is not overly anxious to agree on the amount of back pay due. Issues similar to the present case were involved in *Mary Meynarez v. City of Miami*, Fla. 11th Cir. No. 88-029-AP. There, the Appellate Division panel remanded to the City Manager with instructions that the petitioner be reinstated to her position and awarded back pay. Because of the respondent's position after remand, the petitioner was required to file a second lawsuit to recover back pay in *Mary Meynarez v. City of Miami*, Fla. 11th Cir. No. 88-53299(CA-19).

We certify that copy hereof has been furnished to Kathryn S. Pecko, Assistant City Attorney, 300 Dupont Plaza Center, 300 Biscayne Boulevard Way, Miami, Florida 33131 by mail this 17th day of March, 1992.

/s/ Joel V. Lumer

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APPENDIX E

[FILED MAY 11 1992]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA.

APPELLATE DIVISION

CASE NO. 91-124AP

JON B. LINDEMAN,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

ORDER DENYING MOTION
TO RESERVE JURISDICTION

Opinion filed MAY 11, 1992 1991.

On Petitioner's MOTION TO RESERVE JURISDICTION.

JOEL V. LUME, JOHN J. SPIEGEL for appellant.

JORGE L. FERNANDEZ, KATHRYN S. PECKO for appellee.

Before SIDNEY SHAPIRO, ROSEMARY JONES, and MARTIN KAHN, JJ.

THIS COURT having examined the Motion to Reserve Jurisdiction and being fully advised in the premises, it is

ORDERED AND ADJUDGED that, upon rulings by the majority of the above panel, said Motion to Reserve Jurisdiction is hereby denied.

APPENDIX F

MIAMI CITY CODE

Sec. 40-36. Definitions.

[For purposes of this article:]

Advancement means a transfer made in accordance with this article to a classification which has a higher salary range and for which there is no requirement that the employee must have first held status in a lower classification.

Age limit is the established limit on age. An applicant will be deemed to be within the age limit for examination if the anniversary of his/her birth date falls within one (1) month of the date of the examination.

Board when used by itself refers to the civil service board of the city.

Change in classification is a change to a different classification with no change in pay range or a change to a classification with a lower pay range in which the employee held no previous status. A change in classification is based on a voluntary request or other reason not involving discipline.

Civil service shall comprise all positions of trust, skill or employment, including all employees, whether permanent or temporary, in the service of the city, except as otherwise provided by the city charter.

Classified service comprises all positions not exempted by the Charter in accordance with this article. The Charter

shall be interpreted broadly to include employees in federal grant programs whenever the director of the personnel management department determines that it is feasible to select such employees in accordance with the selection requirements of these rules. The classified service shall be divided into three (3) classes, to be designated "competitive," "noncompetitive" and "labor."

Competitive class shall include all positions and employment for which it is practicable to determine the merit and fitness of applicants by competitive examinations as determined by the director of the personnel management department.

Demotion is a reduction in classification and status. A demotion is used when an employee is found to be unsatisfactory in the employee's higher level or for disciplinary reasons.

Eligible register is a list of persons who have qualified through suitable examination for employment in positions allocated to a specified class or to a limited number of clearly defined positions within a class.

Labor class shall include unskilled labor.

New position means a position created either by:

(1) An authorized addition of a position to an organization unit;

(2) Creation of a position not previously existing; or

(3) Reclassification of a previous position.

Noncompetitive class shall include all positions requiring peculiar and exceptional qualifications of a

scientific, managerial, professional or educational character as may be determined by the director of the personnel management department in accordance with the city charter.

Permanent employee means any employee in the classified service who has been regularly appointed, after serving a probationary period, to a position which normally involves continuous year-round service.

Position is a group of current duties and responsibilities assigned, or delegated by competent authority, requiring the full-time or part-time employment of one (1) person.

Probationary employee means any employee in the classified service who has been regularly appointed to a position but who has not completed the required probationary period. A "probationary employee" is an employee initially employed in a classified position, or an employee who is in the classified service, but who has been promoted, advanced, demoted or changed in classification and who has not completed the probationary period provided in sections 40-71 and 40-72 hereof. A probationary employee has no civil service rights and may be returned to a former classification in which the employee held permanent status, or be discharged if in an entrance position, upon being notified in writing, but shall not be accorded a hearing before the civil service board.

Probationary period is that period of service which an employee must complete prior to obtaining permanent appointment.

Promotion means a transfer made in accordance with this article from a lower to a higher classification in the same job family, involving a requirement that the

employee must have first held status in the lower classification to be eligible for promotion.

Return to former classification is a reversion to a classification in which the employee held status prior to promotion, advancement, change in classification, or appointment to the unclassified service, due to voluntary request or other reason not involving discipline.

Temporary employee means any employee appointed for a special period, for a special project, or to replace a regular employee on leave. Temporary employees accrue no civil service rights in their temporary classifications.

Unclassified service comprises those positions specified in section 36 of the city charter, which shall be interpreted in accordance with the following:

(1) The city manager's "assistants and secretarial staff" shall include all members of the city manager's personal staff. Such positions also shall include assistants and secretarial staff positions authorized in the city budget for the mayor and members of the city commission, provided that employees of such positions shall be nominated by the mayor or commissioner and shall be appointed by the city manager.

(2) The "heads of departments" shall include the directors of all departments, agencies and offices created by the city charter, city ordinance or city budget under the direction of the city manager.

(3) "Assistants to department heads" shall include not to exceed five (5) positions in each city department, agency or office as authorized by the city manager. Such positions shall be in addition to those

positions specified by title in section 36 of the city charter.

(4) Positions funded under federal grant programs shall be unclassified only when the director of the personnel management department determines that it is not feasible to select employees for such positions in accordance with the selection requirements of these rules.

Personnel with permanent civil service rights appointed to unclassified positions shall retain and continue to accrue civil service rights in the classified position from which the appointment was made.* (Ord. No. 8977, § 2 (Rule 1(1.1)-(1.19), Rule 9(9.1)), 7-24-79)

Sec. 40-67. Reclassification of position.

Whenever an occupied position has been allocated to a new or different class, the incumbent thereof shall be qualified for the new class in one (1) of the following manners:

(1) If the incumbent has been performing satisfactorily [in the position reclassified] at the new or higher level for a period of four (4) years or more and has held permanent status in the previous classification, he/she shall receive the new or higher classification with permanent status, without further examination; or

(2) If the incumbent has been performing satisfactorily [in the position reclassified] at the new or higher level for a period of two (2) years or more and less than four (4) years, and has held permanent status in the previous classification, he/she shall be given a qualifying examination, the scope of which shall be at the same level of difficulty as normally given for the same or like

classification, and, if successful therein, he/she shall receive the new or higher classification with permanent status.

In the event the incumbent does not qualify under (1) or (2) above, he/she shall be processed in accordance with the layoff procedures, and the position filled from the appropriate eligible register. (Ord. No. 8977, § 2 (Rule 8(8.11)), 7-24-79)

Sec. 40-97. Disciplinary actions generally.

(a) *Authority of city manager, department director; appeals to board; investigatory, evidentiary powers of board.* Any officer or employee in the classified service may be removed, fined, laid off, or reduced in grade by the city manager or by the director of the department in which he/she is employed, for any cause which will promote the efficiency of the service; but he/she must be furnished with a written statement of the reasons therefor within five (5) days from the date of the removal, suspension, fine, layoff, or reduction in grade, and be allowed a reasonable time for answering such reasons in writing, which shall be made a part of the records of the board; and he/she may be suspended from the date when such written statement of reason is furnished him/her. No trial or examination of witnesses shall be required in such case except at the discretion of the city manager or the department director.

Any employee in the classified service who deems that he/she has been suspended, removed, fined, reduced in grade or demoted without just cause may, within fifteen (15) days of such action by the department director, request in writing a hearing before the civil service board to determine the reasonableness of the action. The board shall, within thirty (30) days after appeal of the employee disciplined, proceed to hear such appeal. After hearing and

considering the evidence for and against the employee, the board shall report in writing to the city manager its findings and recommendations. The city manager shall then sustain, reverse, or modify the action of the department director.

Any member of the civil service board and the director of personnel* may administer an oath to witnesses appearing before said board or said director in an investigation, disciplinary or appeal proceedings, and shall have the power to issue witness subpoenas and to compel the attendance of witnesses.

(b) *Charges preferred by citizens.* The civil service board shall also have the right to remove or reduce any official or employee in the classified service upon written charges of misconduct preferred by any citizen, but only after reasonable notice to the accused and full hearing. (Ord. No. 8977, § 2 (Rule 14(14.1)), 7-24-79)

APPENDIX G

MIAMI CIVIL SERVICE RULES

Sec. 8.1. *From Eligible Register.* Except as otherwise provided in these Rules, every vacancy in the classified service shall be filled by appointment from the appropriate eligible register. Appointments shall be made to, or employment shall be given in, all positions in the classified service by selection of persons certified by the Director of the Human Resources Department.

Sec. 8.11. *Method of Qualifying Incumbents of Classified Positions Allocated to New Or Higher Levels.* Whenever an occupied position has been allocated to a new or different class, the incumbent thereof shall be qualified for the new class in one of the following manners:

(a) If the incumbent has been performing satisfactorily at the new or higher level for a period of four years or more and has held permanent status in the previous classification, he/she shall receive the new or higher classification with permanent status, without further examination; or

(b) If the incumbent has been performing satisfactorily at the new or higher level for a period of two years or more and less than four years, and has held permanent status in the previous classifications, he/she shall be given a qualifying examination, the scope of which shall be at the same level of difficulty as normally given for the same or like classification, and if successful therein, he/she shall receive the new or higher classification with permanent status.

(c) In the event the incumbent does not qualify under (a) or (b) above, he/she shall be processed in accordance with the layoff procedures, and the position filled from the appropriate eligible register.

Sec. 12.1 *Layoff Procedures.* Whenever it becomes necessary to reduce the number of employees within a given classification in any department through lack of work funds or other causes or when a position is abolished, employees shall be laid off as follows:

(1) Duration, emergency or temporary employees.

(2) Probationary Employees.

(3) Permanent Employees.

(a) Layoff shall first be restricted to the classification in which there is a surplus of employees within the department. The person who is found to have the lowest layoff score within the department and classification shall be entitled to fill any existing vacancy in such classification in any department of the City. Should there be no vacancy, the employee with the lowest layoff score shall be entitled to replace the employee with the lowest layoff score City-wide. That employee in turn will have the same rights starting within his/her department to replace another employee, providing that they held a permanent status in some lower subordinate classification.

(b) Employees in a department, division, section, etc., whose functions are to be transferred to any other government agency shall have the right to elect to remain with the City, provided they hold permanent status in a classification that is utilized in any other department and further provided that they have sufficient seniority in the

classification held or previous classifications. Employees subject to any other government transfer shall be processed in the same manner as outlined in this rule.

(c) The order of layoff of permanent employees shall be determined by a layoff score computed in the following manner: A credit for seniority computed at the rate of one-tenth of one point (.1) shall be given to all employees in the particular classification for each full month service within his/her particular classification in which his/her efficiency rating has been reported as other than unsatisfactory, provided, however, that in the case of veterans, one point (1.0) or ten months of seniority shall be added to the total layoff score. No seniority credits for the purpose of determining the layoff score shall be granted for those months within a service rating period wherein an employee's service had been reported as unsatisfactory. A tie in said score shall be broken in favor of the employee with the longest service rating reported as other than unsatisfactory. Should a tie still exist, it shall be decided in favor of the employee who filed the first work application with the City. The employee with the lowest layoff score shall then be laid off. The Civil Service Board or Executive Secretary may refer the employee laid off to a vacancy in a lower entrance level which has similar requirements. It shall not be binding on a Department Director to accept the employee referred to a like or similar classification.

(d) If the said employee has progressed in continuous and uninterrupted service through and holds permanent classification in each of several job classifications in the same job family, he/she shall hold job seniority in any one of the several job classifications as follows:

(i) In the highest job classification, only seniority actually accrued in that classification shall apply.

(ii) In any lower job classification, all seniority accrued in said lower classification, together with all seniority accrued in the several higher classifications, shall comprise the total seniority in the aforesaid lower job classification.

No employee shall have any right or title in a job classification in which he/she was never employed and held a permanent appointment in said classification except as provided in Rule 12.7 hereof.

(e) Any employee holding a permanent or probationary status, in one job classification and elevated to a higher position for the good of the service on a temporary or probationary status shall continue to accrue seniority in the former classification vacated.

(f) Employees who have 'advanced' not in the same job family will maintain seniority in their previous status as of the date they advanced from that status but they will not accrue further seniority in their previous status.

Sec. 12.2. *Layoff Registers.* The names of Police Officers who have completed at least twelve months but less than eighteen months of probationary service and the names of the persons who held permanent status in the classified service which have been abolished or have become unnecessary shall be placed on an appropriate 'Layoff' register in the order of their layoff score, the highest being first, for a period not to exceed thirty-six months during which time said persons may be certified for reemployment. Such employees shall be reemployed with

seniority accrued prior to the layoff but will not accrue seniority during the period of layoff. Layoff registers shall take priority over all registers including promotional.

Reemployment shall be subject to (such persons's passing) a satisfactory physical examination by the City Physician. This rule shall be applied to all layoff registers.

Supreme Court, U. S.
F I L E D
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No. 95-108

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JON B. LINDEMAN,

Petitioner,

v.

CITY OF MIAMI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTS A GOVERNMENT EMPLOYEE WITH A STATE CREATED PROPERTY INTEREST IN EMPLOYMENT FROM TERMINATION FOR ANY REASON OTHER THAN FOR CAUSE WHERE THE EMPLOYEE WAS AFFORDED NOTICE, A HEARING, AND JUDICIAL REVIEW IN STATE COURT.[1]

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[1] Respondent restated the question presented for review to state the issue more precisely.

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STATEMENT IN OPPOSITION TO JURISDICTION

Petitioner asserts that 28 U.S.C. Section 1254(1) serves as the statutory basis for the Court "to review the judgment in question by writ of certiorari...." Petition at 2. However, this provision merely delineates methods of review, as opposed to confer jurisdiction for review.

A review on writ of certiorari is a matter of sound judicial discretion, not as of right. Sup. Ct. R 10.1. Petitioner contends that certiorari should be granted because the decision rendered by the Eleventh Circuit Court of Appeals "conflicts" with decisions of this Court and other United States courts of appeals, and involves "important questions of law."

Petitioner's position is without merit. The Eleventh Circuit's panel "decision" consisted of two sentences:

> Appellant's motion for summary reversal is GRANTED. This matter is REMANDED to the district court for the entry of a judgment consistent with *McKinney v. Pate*, 20 F. 3d 1550 (11th Cir.), *cert. den.* ___ U.S. ____, 115 S. Ct. 898, 899, 130 L.Ed.2d 783 (1995). [Petitioner's Appendix B].

The district court has not entered a judgment or otherwise taken any action on remand. Rather, the only final judgment entered in this case, that is, the final judgment that served as the impetus for Respondent taking the appeal to the Eleventh Circuit, was in Petitioner's favor. Therefore, it is difficult to conceive how the Eleventh Circuit's two sentence decision (or the final judgment in Petitioner's favor in the district court that presently stands reversed) "conflicts" with any opinion

issued by either this Court or any United States court of appeals. It is similarly inconceivable how the Eleventh Circuit's two-sentence decision involves an "important question of law" demanding this Court's resolution. Petitioner's motive in this case is quite transparent. That is, Petitioner uses this case as the vehicle to assail the Eleventh Circuit's en banc decision in *McKinney v. Pate*, 20 F. 3d at 1550, notwithstanding this Court's previous refusal to do so. See ___ U.S. ____, 115 S. Ct. 898, 899, 130 L.Ed.2d 783 (1995). The jurisdictional impediment enables this Court to dismiss the Petition without passing on the arguments raised therein.

STATEMENT OF THE CASE

The brief in opposition to a petition for writ of certiorari "should address any perceived misstatements of fact...." S.Ct.R. 15.1. While Petitioner's statement of the case is generally accurate, the problem is more with what was not stated, as opposed to what was stated.

Petitioner neglected to mention that although he was laid off from his job as of May 23, 1988, his name was placed on a lay-off register. While he was on the eligible register, Respondent located a job for him in the City's Parks and Recreation Department. He returned to work on October 24, 1988 in that department as a Principal Staff Analyst, and continued his employment with the City until he accepted a retirement incentive in 1994.

At the outset, it is important to recognize that the state and federal proceedings are separate and distinct. In the state proceeding, Petitioner exercised the procedures that are

accorded him under the City of Miami Civil Service Rules and state law to challenge the wrongful layoff.

City of Miami Civil Service Rule 14.3 authorizes any "employee in the classified service with permanent Civil Service status, who has been suspended, reduced in rank, or dismissed" to challenge said action by way of an "appeal" to the Civil Service Board. In addition, City of Miami Civil Service Rule 16.2 entitles an employee who has been "aggrieved by reason of what he/she considers to be a violation of the Civil Service rules to his/her detriment" to a hearing before the Civil Service Board. After the hearing accorded under either of the aforementioned Civil Service rules, the Civil Service Board makes findings and recommendations to the City Manager. Thereafter, the City Manager may then sustain, reverse, or modify the action, or direct an appropriate remedy where necessary. The employee may then file a petition for writ of common law certiorari in the Dade County Circuit Court seeking to quash the City Manager's decision if said employee is not satisfied with the City Manager's determination.

That is precisely the procedure Petitioner followed in the state proceeding. Petitioner requested, and was given, a hearing before the Civil Service Board. The Civil Service Board agreed with Petitioner that the Civil Service rules had been violated, and recommended that he receive back pay, that the appropriate adjustment be made to his past and present salary and pension plan, that the appropriate adjustment be made to his title, and that he should otherwise be made whole as a result of the wrongful layoff.

The City Manager rejected the Civil Service Board's findings and recommendations and entered a judgment

accordingly. Petitioner then filed a petition for common law certiorari in Dade County Circuit Court, where the matter was briefed and argued orally. A three-judge panel agreed with Petitioner, quashed the judgment entered by the City Manager, and ordered Respondent to follow the Civil Service Board's findings and recommendations. Respondent complied.

The state action vis-a-vis the hearing authorized by the Civil Service rules and the certiorari proceeding in Circuit Court dealt with a single narrow issue: whether the manner in which Petitioner was laid off violated the Civil Services rules. The state proceeding encompassed no other substantive claim. Rather, Petitioner availed himself of all the procedural process accorded under state law and prevailed. As a result of the state proceeding, Petitioner received back pay, adjustments to his past and present salary and pension, adjustment to his title, and was otherwise made whole as a result of the wrongful layoff.

Petitioner filed the instant case in the United States District Court for the Southern District of Florida before the state proceedings concluded. In the complaint, Petitioner asserted that Respondent deprived him of property without due process of law by virtue of his wrongful layoff and sought relief for the violation of his civil rights under 42 U.S.C. Section 1983. Petitioner did not allege a violation of any other constitutional right.

The district court recognized early on that, despite Petitioner's nebulous pleading as to whether his claim encompassed both procedural and substantive due process, there was no viable procedural due process claim. In an order on Respondent's motion for summary judgment entered

on May 20, 1992, the district court found that Petitioner took advantage of procedures to have an employment decision reviewed, and the state court ruled in his favor. The district court granted the City's motion for summary judgment "as it relates to a violation of Lindeman's right to procedural due process" because Petitioner had been "afforded the opportunity to contest the wrongful layoff and has received, or will receive, compensation sufficient to make him whole," but denied the motion as it related to substantive due process. This ruling left substantive due process as the sole claim to be tried.

The substantive due process violation was tried non-jury in January, 1993. The district court determined that final judgment should be entered in favor of Petitioner in its memorandum opinion and order issued July 14, 1993. On the same day, the district court entered final judgment for Petitioner in the amount of $25,000 for compensatory damages, and $7,370.50 for lost vacation and sick pay. The district court denied all the post-trial motions filed by both parties and awarded Petitioner attorney's fees in the amount of $76,230.

Respondent timely appealed both the final judgment and the attorney's fee award. Petitioner filed a notice of cross appeal in regard to the final judgment. Respondent filed a motion to stay the appellate proceedings pending this Court's resolution of a petition for writ of certiorari filed in *McKinney v. Osceola County Board of County Commissioners*, Case No. 94-568,[2] which the Court of Appeals granted. This Court denied the petition for writ of certiorari in *McKinney* on January 17, 1995. In an effort to avoid unnecessary judicial labor and the expense of briefing the case, the City thereafter filed in the Court of Appeals a motion for summary reversal of final judgment on appeal. Respondent premised

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2 *McKinney v. Pate*, 20 F. 3d 1550 (11th Cir. 1994)(en banc).

its motion on the fact that the Court of Appeals' *en banc* decision in *McKinney* was dispositive. A panel of circuit judges unanimously granted the City's motion by an order issued on April 10, 1995, the substance of which has already been quoted above verbatim.

Petitioner thereafter filed the instant petition for writ of certiorari. The district court has not taken any action on remand as of the time of filing this response in opposition to the petition for writ of certiorari.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The substantive component of the Due Process Clause protects fundamental rights, that is, those that are created by the Constitution, and certain other rights such as the right of privacy. *Planned Parenthood v. Casey*, ____ U.S. ____, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Palko v. Connecticut*, 302 U.S. 319 (1937). "The history of substantive due process 'counsels caution and restraint.' " *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985), (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)). In fact, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

The Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 195

(1989). Otherwise stated, "[i]ts purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Tort and employment law, areas in which substantive rights are created by virtue of state law, remain outside the scope of the scope of substantive due process jurisprudence. *Daniels v. Williams*, 474 U.S. 327 (1986); *Bishop v. Wood*, 426 U.S. 341 (1972); *see also McKinney v. Pate*, 20 F. 3d 1550 (11th Cir. 1994)(en banc), *cert. denied*, ___ U.S. ____, 115 S. Ct. 898, 899, 130 L.Ed.2d 783 (1995).

Assuming *arguendo* that the court of appeals' two-sentence summary reversal is a reviewable order, the decision rendered does not, as Petitioner asserts, conflict with any of this Court's decisions. Moreover, the Eleventh Circuit's en banc decision in *McKinney*, the case upon which the court of appeals relied to grant summary reversal in the instant case, is thoroughly consistent with this Court's precedent.

The Petitioner in *McKinney*, like Petitioner herein, was a full-time permanent employee who was terminated by his local government employer. Like Petitioner herein, he was afforded hearings to challenge his termination. Like Petitioner, McKinney filed suit against his former employer wherein he alleged, inter alia, violation of his civil rights under 42 U.S.C. Section 1983. The jury returned a verdict for McKinney on his substantive due process claim, but the district court set aside the jury's verdict and entered judgment for the employer.

The Eleventh Circuit, en banc, held that in non-legislative cases, only procedural due process claims are available to pretextually terminated employees. *McKinney*, 20 F. 3d at 1560. The Court of Appeals opined that

> areas in which substantive rights are created only by state law (as is the case with tort law

> and employment law) are not subject to substantive due process protection because 'substantive due process rights are created only by the Constitution.' [citation omitted].

McKinney, 20 F. 3d at 1556. Thus, clearly the Eleventh Circuit adhered to, and did not depart from, this Court's substantive due process jurisprudence.

The decisions of this Court which Petitioner alleges "conflict" with the "decision" rendered below are inapposite. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the issue before the Court concerned the constitutionality of an Oklahoma statute that required all state officers and employees to take a loyalty oath within a prescribed period of time. This Court found that the statute offended due process as an assertion of arbitrary power because it indiscriminately classified innocent with knowing activity. That is, it did not matter whether the membership in a proscribed association existed knowingly or innocently. Moreover, the employees in that case were not permanent employees with a vested property right.

Petitioner relies on *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), because a "portion of the *Wieman* decision was quoted with approval...." Petition at 9-10. In *Slochower*, this Court addressed the constitutionality of a provision in the New York City Charter that required an employee to be terminated and banished from holding any other office or employment in the city if an employee invoked the privilege against self-incrimination to avoid answering a question relating to his official conduct. Again, this decision is inapposite because the Court passed on the constitutionality of a provision as applied to a city college professor who was summarily discharged without notice or hearing. Although the provision failed to pass constitutional

muster, this Court observed that "[t]his is not to say that Slochower has a constitutional right to be an associate professor ... The State has broad powers in the selection and discharge of its employees." *Id.* at 559.

Petitioner further relies on *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961) because "the same language [in *Wieman*] was, again, quoted wtih approval...." Petition at 10. As in *Weiman*, this Court passed on the validity of a state statute which required public employees to take a "loyalty oath" or suffer termination. The Court found that the statute was vague, but quoted from one of its earlier cases where it observed that "[i]t is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Cramp*, 368 U.S. at 287 (quoting *Champlin Ref. Co. v. Corporation Com. of Oklahoma*, 286 U.S. 210,243, 52 S.Ct. 559, 76 L.Ed. 1062 (1932).

In *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 81 S.Ct. 174, 6 L.Ed.2d 1230 (1961), this Court addressed whether a short order cook in a cafeteria operated on a military installation was entitled to notice and a hearing before her security badge was revoked. Not only is this case inapposite because the procedural aspect of due process, that is, notice and hearing are not at issue herein, Petitioner's quotation from the decision is misleading due to the fact that it is incomplete. While this Court did recognize that there are some constitutional limitations on state and local government employers' freedom of action that are not visited upon private employers, this Court further observed that such a recognition does not mean that

> all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory -- that she could not have been kept out because she was a Democrat or a Methodist.

Id. at 898. Moreover, the Court noted that it has consistently recognized that "the interest of a government employee in retaining his job can be summarily denied." *Id.* at 896.

This Court's analysis in *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979), which involved a tenured teacher who was sanctioned by the school district by refusal to renew her contract, does not compel a contrary result. In that case, the school district conceded that the teacher was tenured under state law; therefore, she could only be dismissed for specified reasons. The court of appeals found that the teacher had a constitutional right to retain her employment as a teacher, and the school district's capricious and arbitrary action violated both due process and equal protection. This Court reversed. It found that the teacher's "claim of a denial of substantive due process under these circumstances is wholly untenable." *Id.* at 199. The Court observed that the interest to which the teacher claimed substantive due process protection did not resemble an individual's freedom of choice in regard to certain basic matters of procreation, marriage and family life. Rather, the teacher merely claimed that she could not be discharged for failure to comply with a continuing-education requirement incorporated into her contract. Although the Court engaged in a substantive due process analysis of sorts, it did not

directly address the issue of substantive due process for state created employment rights.

The opinions of this Court upon which Petitioner relies for asserted "conflict" have no bearing on the decision rendered by the Eleventh Circuit either in the two-sentence summary reversal entered below or in *McKinney*. For the most part, these cases were decided during a time when fear of Communism was rampant, and states enacted laws requiring government employees to render "loyalty oaths" as a "protective measure." On the hand, Respondent relies on the decisions of this Court that supply an analytical framework to reach the determination that state-created employment rights should not be accorded federal substantive due process protection.

Petitioner also asserts that the Court should grant the petition because "[d]ecisions directly opposite to the decision in the present case, and opposite *McKinney v. Pate, supra,* were rendered" by various circuit courts of appeals.. Petition at 6. This is an erroneous premise. First, many of the cases upon which Petitioner herein relies are the very cases relied upon by the petitioner when this Court denied certiorari in *McKinney v. Pate,* ___ U.S. ___, 115 S.Ct. 898, 899, 130 L.Ed.2d 783 (1995).

Second, it is not surprising that federal circuits have not uniformly treated the issue because the property right in employment is created by state law. This requires the federal circuits to decide the issue in the conjunction with the applicable state law and the rights, if any, created by the particular state law or laws.

State law and remedies governed Petitioner in his challenge to the layoff. That is, Petitioner was given notice of the layoff as required by the City of Miami Civil Service rules. He took advantage of the hearing procedure afforded by the

Civil Service rules to challenge the layoff. Although the Civil Service Board agreed with Petitioner and made its findings and recommendations accordingly, the City Manager rejected them because he disagreed that any of the Civil Service rules had been violated. Thereafter, Petitioner filed an action to review the City Manager's rejection in state court, where he prevailed and was made whole as a result of the wrongful layoff.

Given the diversity of state laws that confer (or fail to confer) a property interest in employment, the Court's analytical framework militates against according substantive due process protection to state-created employment property rights uniformly among the circuits. Under these circumstances, this Court should adhere to its historical course of judicial restraint and caution in regard to the expansion of substantive due process as suggested by Petitioner.

Interestingly, one of the cases upon which Petitioner relies for inter-circuit conflict, *Newman v. Burgin*, 844 F. 2d 19 (1st Cir. 1989), appeal after remand, *Newman v. Burgin*, 930 F. 2d 955 (1st Cir. 1991), actually supports the summary reversal entered below. In the appeal after remand, the tenured professor argued she was denied substantive due process because the university did not follow ordinary procedures for personnel actions in a manual known as the "Red Book." The First Circuit rejected this contention and found that

> [t]he Due Process Clause ... does not require the University to follow any specific set of detailed procedures as long as the procedures the University actually follows are basically fair ones ... Whether the University was, or was not, supposed to

> apply its "Red Book" procedures in this case is a matter of University rule or policy, not of federal constitutional law.

930 F. 2d at 955 (emphasis added). Thus, the First Circuit affirmed the summary judgment entered for the university defendants. Likewise in the instant case, whether or not Respondent followed its Civil Service rules is a matter of state rule or policy, not federal constitutional law. The state court found in Petitioner's favor in this regard and ordered the appropriate relief. Federal constitutional law should not now be applied so as to afford Petitioner a windfall after he has availed himself of procedures and remedies afforded under state law.

Finally, Petitioner urges the Court to review the case because there is an "[i]mportant question of federal law which should be settled by this Court." Petition at 11. In support thereof, Petitioner asserts that "[b]ecause of the large number of public employees in this country, this is an issue that will arise time and again, and will present the lower courts with a question of law on which there are conflicting precedents...." Petition at 11. Petitioner is mistaken. It is neither wise nor feasible for the Court to etch a rule of law, to be applied uniformly throughout this country, which affords substantive due process protection where the underlying property right is merely a creature of state law.

This Court is requested to decline Petitioner's invitation to expand substantive due process jurisprudence into this unchartered and open-ended area. Rather, Respondent requests this Court to follow its own astute recognition that

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh

> fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error ... The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 349-50 (1976).

CONCLUSION

This Court should deny the petition for writ of certiorari.

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CITY OF MIAMI,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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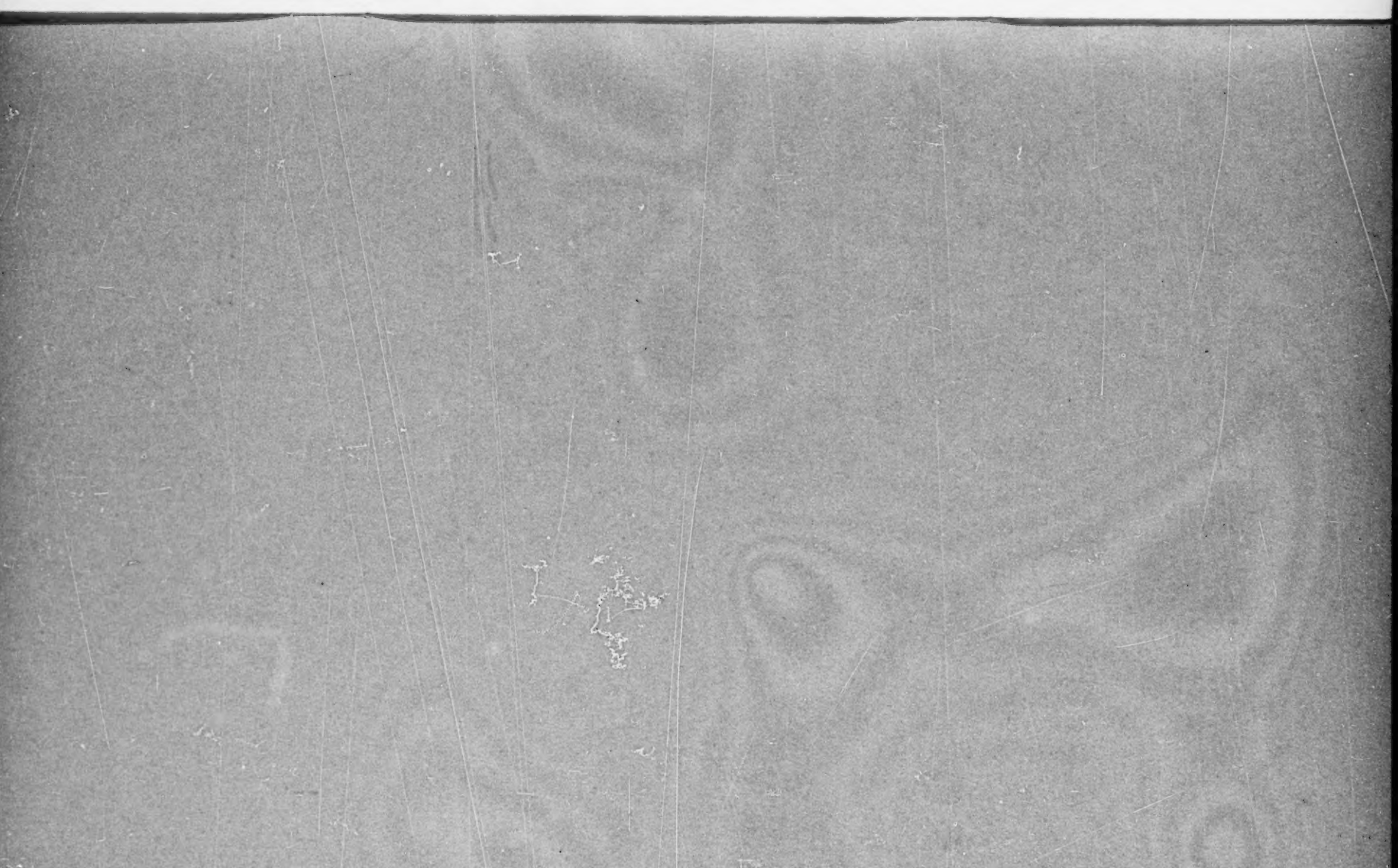

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STATEMENT OF THE CASE

At the risk of distracting from the central and important constitutional issues presented by this case, petitioner is constrained to advise the court as to the differences between the record in this case and the facts as presented by respondent.

The Brief in Opposition says at page 2 that when Jon Lindeman lost his employment with the City of Miami on May 23, 1988 his name was placed on a layoff register. This is contrary to the findings of fact by the U. S. District Court and the record in this case. The district court expressly found: "Lindeman's name was not placed on the layoff register in a timely manner." (R2-80-5). Joni Jones Harris, the city's senior personnel officer (R4-77), testified at the trial of this case that the City of Miami Civil Service Rule requiring that priority be given to persons placed on a layoff register in filling open positions was not followed in the instant case. (R4-84). The Miami Civil Service Commission found that the city had violated "Rule 12.1, Layoff Procedures" in the discharge of Lindeman in this case (Pl. Ex. 9 p. 2). The assertion at page 11 of the Brief in Opposition that "Petitioner was given notice of the layoff as required by the City of Miami Civil Service rules" is similarly incorrect and not supported by the record.

Page 2 of the Brief in Opposition indicates that Lindeman's name was placed on an eligible register and that the City of Miami located a job for him in the Parks and Recreation Department. No such eligible register was placed in evidence, no witness testified that Lindeman

was placed on such an eligible register and there is nothing in the record of this case to support the assertion that Lindeman's name was placed on such an eligible register. The actual testimony of how Lindeman obtained a job in the Parks and Recreation Department was:

> Well, a friend of Carlos was at a party where a former city attorney was also at, and happened to mention to this former city attorney that I had been laid off and what was the story.
>
> This former city attorney said to have me call her, which I did, and she in turn after hearing my story, she called the city manager.

(R4-55).

At page 2, the Brief in Opposition says that Lindeman "accepted a retirement incentive in 1994." The trial of this case was held in January 1993. Whatever occurred in 1994 is beyond and outside any record in this action. The fact that the City was able to force Lindeman out of his employment through use of the euphemistic "retirement incentive" is irrelevant to the issues before the court. The actual reality is that the "retirement incentive" agreement was entered into in April 1995.

The Brief in Opposition quotes from the City of Miami Civil Service Rule 14.3 to describe a process for review of employment decisions. Rule 14.3 is totally unrelated to the present case. Lindeman's employment was terminated in May 1988 (R2-80-3). In the summer of 1990, he first learned of City of Miami Study 88-46 (R4-57). It

was through the implementation of Study 88-46 that Lindeman's job was given to a probationary employee, Sylvia Zamora (R2-80-2 to 4). In the summer-fall of 1990, Lindeman commenced his civil service proceedings (R4-58) and these were "pursuant to Rule 16.2." (Pl. Ex. 9 p. 1). Rule 14.3, quoted from by the City, requires that "an appeal must be made in writing within fifteen days from the effective date of the [employment action]." (Pl. Ex. 7 p. 32). The City has taken the position in this case that "in grievance and abuse hearings brought by employees pursuant to Civil Services Rule 16 as in the instant case, the Civil Service Board acts in an advisory capacity." (Pl. Ex. 13 p. 8).

Contrary to the assertion in respondent's restated "Question Presented for Review," Lindeman was not given notice that his job had been given to a probationary employee nor the procedures through which his employment was terminated. The district court found: "At no time prior to his termination was Lindeman ever advised by any supervisor of the existence of Study 88-46." (R2-80-3).

Page 3 of the Brief in Opposition says: "A three-judge panel agreed with Petitioner, quashed the judgment entered by the City Manager, and ordered Respondent to follow the Civil Service Board's findings and recommendations." It says in the next paragraph: "As a result of the state proceeding, Petitioner received back pay, adjustments to his past and present salary and pension, adjustment to his title, and was otherwise made whole as a result of the wrongful layoff." The City's assertions in these regards are not supported by the record. The record shows that the three judge state court panel refused to

retain jurisdiction to enforce their decision (App. 20-21). Though the state court decision was rendered on March 9, 1992 (App. 17), there was no settlement of salary due Lindeman until one week before the trial in the district court case which began on January 20, 1993 (R5-271). There was no payment for either sick time or vacation time as the result of the state court proceedings (R5-271). There is no evidence in the trial record, or anywhere else in this case, concerning adjustments to pension. Concerning Lindeman's job title, there is no evidence in the record that Lindeman's job title was changed as the result of the state court proceedings. Lindeman returned to work in 1988 at the Department of Parks and Recreation in the position of principal staff analyst (R4-56) and was employed in that position at the time of the district court trial in January 1993 (R4-67). He never returned to the position of chief management analyst in the Management and Budget Department or the position of principal productivity analyst in the Office of Industrial Engineering.

There is nothing in the record of this case to support the contention by the City that Lindeman "was otherwise made whole" by the state court proceedings. It was in the district court proceeding that Lindeman was awarded $7,370.50 in lost vacation pay and lost sick pay and $25,000.00 incompensatory damages (R2-79-1). The assertion at page 12 of the Brief in Opposition that "Petitioner filed an action to review the City Manager's rejection in state court, where he prevailed and was made whole as the result of the wrongful layoff" is similarly incorrect and not supported by the record.

The City of Miami is correct in asserting that the district court has not entered a new judgment on remand.

It cannot be gainsaid, however, that the entry of a new judgment in favor of the City is a *pro forma* and purely ministerial act. The court of appeals granted a summary reversal of the district court's judgment and remanded with directions to enter a judgment consistent with an opinion which says that a public employee is not entitled to the protection of substantive due process of law when his employment is terminated. The logical extension of the City's argument would lead to an irrational result. Sup. Ct. R. 13.1 requires that a petition for a writ of certiorari be filed within 90 days after entry of judgment by the court of appeals. If a party had to await the entry by the district court of a *pro forma* judgment on remand, his right to seek review in the U. S. Supreme Court could be defeated merely by the district court waiting more than 90 days to enter that judgment.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The City of Miami asserts that because the decision of the court of appeals consists of two sentences, it cannot conflict with decisions of other courts of appeals or with decisions of this Court nor can it involve important questions of federal law. The City confuses the term "decision" with the "opinion" of a court of appeals. As set out in *Black's Law Dictionary* 407 (6th ed. 1990): " 'Decision' is not necessarily synonymous with 'opinion'. A decision of the court is its judgment; the opinion is the reasons given for the judgment, or the expression of the views of the judge. But the two words are sometimes used interchangeably."

A conflict between decisions as used in Sup. Ct. R. 10 "means that there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or the general principles utilized." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth E. Geller, *Supreme Court Practice* § 4.3 at 167 (7th ed. 1993) (footnote omitted). The decision in the instant case presents a real conflict on the same matter of law when compared with decisions of other circuits: some circuits hold that a public employee is entitled to the protection of substantive due process of law and some do not.

An important question of federal law, as used in Rule 10, means a problem beyond the academic, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955), which involves principles the settlement of which are important to the public. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Not only does the present case involve basic constitutional rights that are important to millions of public employees, it involves principles which are also important to their employers, the general public. The fact that the determination of those rights and principles were expressed in a two sentence opinion does not undo the reality that basic rights affecting millions of people are being determined or diminish the importance of those rights and principles to the general public.

Decision in Conflict with a Decision of Another United States Court of Appeals on the Same Matter

Conspicuous by its absence from the Brief in Opposition is any assertion that the decisions from courts of appeals cited in the Petition for Writ of Certiorari are not in conflict with the decision by the court of appeals in the

present case other than the discussion of *Newman v. Massachusetts*, 884 F. 2d 19 (1st Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990) (Newman I), and *Newman v. Burgin*, 930 F. 2d 955 (1st Cir. 1991) (Newman II). The City of Miami relies on *Newman II* to overcome the conflict between *Newman I* and the decision below in the present case. *Newman I* discusses the principles of substantive due process. 884 F. 2d at 24-26. *Newman II* in no way says that it is overruling the decision in *Newman I*. *Newman II* discusses procedural due process and the portion of the opinion quoted in the Brief in Opposition concerns solely procedural due process and not substantive due process. In context, the portion of *Newman II* quoted says that the procedures followed by the University of Massachusetts met the minimum standards the Constitution requires, the standards set forth in the University's "Red Book" were greater than the Constitution requires, and the failure to meet the "Red Book" standards is a matter of University rule or policy and not federal constitutional law. The discussion of procedural due process in *Newman II* has no relation to the issues presented by the instant case.

The Brief in Opposition attempts to dismiss the lack of uniformity among the various courts of appeals by ascribing it to interpretation of state laws and the property rights created by particular state laws. Respondent misses the point. In the present case, and in the decisions of the courts of appeals described in the Petition for Writ of Certiorari, each court determined that the public employee had a property interest in his or her job. The issue presented by those cases was beyond consideration of state law and whether a property right in employment existed. The issue in all of those cases, and in the present

case, involved the construction of the U.S. Constitution and whether, given the existence of a property right, it was protected against arbitrary government action.

Decision in Conflict with Applicable Decisions of this Court

The City of Miami, at page 7 of its brief, cites *Bishop v. Wood*, 426 U.S. 341 (1972), for the proposition that employment law is an area of the law which remains outside the scope of substantive due process jurisprudence. That is not the holding of *Bishop v. Wood*. In *Bishop*, the district court ruled that the municipal employee did not have a property interest in his job and "held his position at the will and pleasure of the city." 426 U.S. at 345. This construction of North Carolina law was upheld by the Court of Appeals for the Fourth Circuit and was the foundation of the decision by this Court. *Id.* at 346-47. Without a property interest in his job, Bishop had nothing to be protected by the Fourteenth Amendment. Unlike *Bishop*, the district court in the present case found that Jon Lindeman did have a property interest in his job (R2-80-7) and that property interest is entitled to some protection by the Due Process Clause of the Fourteenth Amendment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). The *Loudermill* opinion says at its pertinent part: "Respondents' federal constitutional claim depends on their having a property right in continued employment [citations omitted]. If they did, the State could not deprive them of this property right without due process." 470 U.S. at 538 (footnote omitted).

The portion of *Cafeteria and Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 898 (1961), quoted in the Brief in Opposition supports the position of petitioner, Job Lindeman, that the decision below in the present case conflicts with prior decisions of this Court. The bedrock of substantive due process is that governments may not take actions which are arbitrary and deprive a person of a property right. In the *McElroy* case, the worker who had lost her job as the result of being determined a security risk was Rachel Brawner. In the decision, the Court said: "We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory. . . . " 367 U.S. at 898. If substantive due process did not protect against arbitrary acts of government that deprived people of property interests in their jobs, no such assumption could have been made.

Respectfully submitted,

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